

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-214595.2

DATE: February 27, 1985

MATTER OF: Vulcan Engineering Co.--Request
for Reconsideration

DIGEST:

1. The protester bears the burden of proof and where the only evidence concerning an issue of fact is the conflicting statements of the protester and the agency, the issue should be resolved in favor of the agency.
2. Arguments which amount to a reiteration of those previously considered in deciding the initial protest do not provide a basis for reconsideration.
3. Agency request for reconsideration of protest decision filed more than 10 working days after basis for reconsideration is known is untimely.

Vulcan Engineering Co. and the Naval Facilities Engineering Command (NAVFAC) request us to reconsider our decision in Vulcan Engineering Co., B-214595, Oct. 12, 1984, 84-2 C.P.D. ¶ 403, wherein we sustained Vulcan's protest against the award of a contract to Arnold M. Diamond, Inc., for foundry modernization at the Norfolk Naval Shipyard in Portsmouth, Virginia, but denied Vulcan's request that we recommend termination of the contract for the convenience of the government. We affirm the decision.

In our prior decision, we found that information submitted to NAVFAC prior to award did not provide a reasonable basis for the agency's determination that the subcontractor proposed by Diamond to install the equipment met definitive responsibility criteria in the invitation for bids. That criteria required experience in successfully installing six specific foundry process systems which had been in satisfactory operation for at least 24 months. We held that this misapplication of definitive responsibility criteria rendered the affirmative determination of Diamond's responsibility, and thus the resulting award to Diamond, improper.

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Nevertheless, we denied Vulcan's request that we recommend termination of Diamond's contract and instead we held that it was appropriate for Vulcan to recover its costs of preparing its bid.

We indicated that in determining whether to recommend termination, we consider such factors as the seriousness of the procurement deficiency, the degree of prejudice to other offerors or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of termination on the procuring agency's mission. See Amdahl Corp.; ViON Corp.--Reconsideration, B-212018.3, et al., Dec. 19, 1983, 83-2 C.P.D. ¶ 703.

In applying these factors, we noted that:

"NAVFAC informs us that substantial delays in performing the foundry modernization, the need for which arose some years ago, and substantial costs to the government would result from a termination of the contract with Diamond and award to another firm. Approximately 6 months of the 15 months allowed for performance of the contract have expired. NAVFAC indicates that, in addition to the inevitable delay between any recommendation for a termination and the subsequent award of a contract to a new contractor, the time spent thus far in preparing detailed blueprints and plans would be lost if award were made to another firm since a new contractor would likely insist upon preparing its own detailed blueprints and plans. In addition, NAVFAC estimates that the government could be liable for up to \$250,000 in direct costs incurred in performing the contract, \$60,000 in overhead, plus unspecified lost profits and costs in preparing the contractor's termination claim.

"Finally, we have been informally advised by NAVFAC that it intends to reconsider the use of such definitive responsibility criteria in future solicitations.

"Since the cost to the government appears to be out of proportion to any benefits received from termination, we decline to recommend that NAVFAC terminate Diamond's contract for the convenience of the government. See Amdahl Corp.; ViON Corp.--Reconsideration, B-212018.3 et al., supra, 83-2 CPD ¶ 703 at 5. Our review of the record also suggests that the stringent definitive responsibility criteria used in this solicitation may not have been necessary to the selection of a contractor capable of satisfactorily performing the work."

Vulcan's Request

In its request for reconsideration, Vulcan reiterates the arguments it initially raised. Once again, it points to the serious nature of the procurement deficiency and contends that substantial damage to the integrity of the procurement system has occurred. Moreover, Vulcan indicates that it has been informed by the Navy that no significant portion of the contract has been performed and that termination costs should not exceed \$50,000.

In response, NAVFAC states that it can "have no accurate picture [of termination costs] absent a termination cost proposal from the contractor," but instead "can only speculate" that based on its experience the contractor:

"at this stage of the contract conservatively would have incurred at least 20 percent of the total contract price (approximately \$175,000) in direct costs plus approximately \$60,000 in indirect costs (including a termination cost proposal). The actual termination costs could be lower or significantly higher."

In reaching our original decision, we did consider the nature of the procurement deficiency, and Vulcan has added nothing to what we previously considered on this point. See Development Associates, Inc.--Reconsideration, B-205380.2, B-205380.3, Mar. 28, 1983, 83-1 C.P.D. ¶ 313 (arguments which amount to a reiteration of those previously considered do not provide a basis for reconsideration).

As for the question of termination costs, we note that Vulcan has submitted no evidence documenting the alleged statement by the Navy that termination costs should not exceed \$50,000. While recognizing the tentative character of NAVFAC's estimate, we also believe that Vulcan has not shown that it is in any better position to make a more accurate estimate of termination costs than is NAVFAC.

Since Vulcan has failed to provide new evidence or legal arguments which show that our prior refusal to recommend termination was erroneous, that decision is affirmed. See Koch Corporation-Reconsideration, B-212304.4, July 31, 1984, 84-2 C.P.D. ¶ 132.

However, we have been informally advised that NAVFAC has not yet approved Diamond's detailed blueprints, plans and drawings for the project. Although we are unwilling to recommend termination on the record before us, nevertheless, given this information as to the extent of Diamond's performance, we recommend that NAVFAC examine the feasibility of terminating its contract with Diamond. We request NAVFAC to advise us and those parties, including the Committee on Armed Services, House of Representatives, and those members of Congress who have expressed an interest in this protest, of the results of that examination.

Navy's Request

In its November 16, 1984, response to Vulcan's request for reconsideration, NAVFAC requested that we reconsider our October 12 decision sustaining the protest.

Our Bid Protest Procedures provide that a request for reconsideration must be received by this Office not later than 10 working days after the basis for reconsideration is known or should have been known. 4 C.F.R. § 21.9(b) (1984). NAVFAC's basis for requesting reconsideration is its dissatisfaction with our October 12 decision. Its failure to file its request within 10 working days of receiving that decision renders its request untimely. See Marker-Modell Associates--Request for Reconsideration, B-215049.2, July 26, 1984, 84-2 C.P.D. ¶ 117; cf. Griffin-Space Services Company--Reconsideration, B-214458.3; B-214458.4, Nov. 14, 1984, 64 Comp. Gen. _____, 84-2 C.P.D. ¶ 528 (agency request for reconsideration untimely where based on information it could have presented at time of protest but chose not to).

NAVFAC's request for reconsideration is denied.

Bid Preparation Costs

In our prior decision, we held that it was appropriate for Vulcan to recover its costs of preparing its bid even though there was an intervening bidder between Vulcan and Diamond whose responsibility was undetermined. Although NAVFAC has not requested reconsideration of our decision in this regard, we note that contracting officials recently denied the claim submitted by Vulcan for its bid preparation costs. In view of the intervening bidder, NAVFAC thinks that an award of bid preparation costs to Vulcan is inappropriate.

We disagree. NAVFAC failed to argue that Vulcan lacked a substantial chance for award because of the intervening bidder until the protest had been largely developed. By that time, a deficiency in the procurement had been revealed as a result of Vulcan's utilization of the bid protest process. Moreover, the intervening bidder had not participated in the bid protest process and there was no indication that it had extended its bid or had otherwise expressed an interest in award. We therefore concluded that Vulcan was an interested party to protest the award. We also concluded, and we remain convinced, that an award of bid preparation costs to Vulcan was appropriate if the integrity of the bid protest process was to be maintained.



Comptroller General
of the United States